United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original with Affidavit of Mailing

76-6102

To be argued by
CONSTANCE M. VECELLIO

B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6102

ARNOLD HAJE, THOMAS BEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON and WARREN C. MCDOWELL,
Plaintiffs-Appellants,

—against—

ROBERT E. HAMPTON, Chairman, JAYNE B. SPAIN and L. J. ANDOLSEK, Commissioners, constituting the UNITED STATES CIVIL SERVICE COMMISSION, BILLIE H. VINCENT, Facility Chief, New York Center, GERALD SHIPMAN, Personnel Officer, New York Center, LOUIS C. POL (Acting) Facility Chief, FAA, New York Center, DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Eastern Region, Federal Building, Jamaica, New York, and the UNITED STATES OF AMERICA,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
CONSTANCE M. VECELLIO,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6102

ARNOLD HAJE, THOMAS BEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON and WARREN C. MCDOWELL,

Plaintiffs-Appellants,

—against—

ROBERT E. HAMPTON, Chairman, JAYNE B. SPAIN and L. J. ANDOLSEK, Commissioners, constituting the UNITED STATES CIVIL SERVICE COMMISSION, BILLIE H. VINCENT, Facility Chief, New York Center, GERALD SHIPMAN, Personnel Officer, New York Center, LOUIS C. POL (Acting) Facility Chief, FAA, New York Center, DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Eastern Region, Federal Building, Jamaica, New York, and the UNITED STATES OF AMERICA,

Defendants-Appellees.

BRIEF FOR THE APPELLEES

Preliminary Statement

This is an appeal by plaintiffs Arnold Haje, Thomas Bevilacque, Louis C. Resler, John J. Shannon and Warren C. McDowell from an order of the United States District Court for the Eastern District of New York (Costantino, *J.*), entered June 2, 1976 and from the judgment entered in accordance with that order on June 4, 1976. The

order granted defendants'[1] motion for summary judgment against the plaintiffs, who were seeking a review of their dismissal by the Federal Aviation Administration (FAA) from their positions as air traffic controllers and of the subsequent affirmance of those dismissals by the Civil Service Commission.[2]

On appeal, appellants contend that their dismissals were improper.

Statement of Facts

Appellants all received career conditional appointments as air traffic control specialists (Appellees' Appendix pp. 1-5) and began their employment as either GS-6 or GS-7 controllers (Complaint, ¶s (5), (18), (31), (44), and (57), Appellants' Appendix 8a, 9a, 12a, 16a, 20a, and 23a-24a).[3] A condition of their employment in these positions was that failure to pass training requirements or to accept promotion to higher grade positions might constitute grounds for reassignment, demotion, or separation. (Appellees' Appendix pp. 6-9). Prior to their dismissals, four of the five appellants were GS-9's (Complaint, ¶s

---

[1] Defendants are the Chairman and officials of the Civil Service Commission and New York officials of the Federal Aviation Administration of the Department of Transportation.

[2] Certified copies of plaintiffs' administrative records were attached as appendices to Defendants' Memorandum in Support Their Motion for Summary Judgment and in Opposition to ..intiffs' Motion for Summary Judgment in the district court, ... thus constitute part of the record on appeal. In addition, relevant portions of those administrative records are included in Appellees' Appendix.

[3] Appellants began their employment on the following dates: Haje (GS-7), June of 1970; Bevilacque (GS-7), July of 1970; Resler (GS-7), December of 1969; Shannon (GS-6), June of 1970 and McDowell (GS-6), December of 1968. (Appellants' Appendix 9a, 12a, 16a, 20a, and 24a).

(5), (18), (31), and (44)), while the fifth, Warren G. McDowell, was a GS-11 (Complaint, ¶ (57)). At the time of the dismissals appellants were all working at the FAA facility in Ronkonkomo, New York. As noted above, each was required to take further upgrade training in order to progress to the next grade level, and by 1972 each of the appellants had completed this training. Appellants' dismissals resulted from their inability to pass the examinations given at the end of the training periods.

On March 8 and 9, 1972, appellants Haje, Bevilacque, Resler and Shannon received Notices of Proposed Removal from their respective positions as Air Traffic Control Specialists (Center) GS-2152-9 (Appellants Appendix pp. 10-21). On August 2, 1972, appellant McDowell received a Notice of Proposed Removal from his position as Air Traffic Control Specialist (Center) GS-2152-11 (Appellants Appendix p. 22-23).

With respect to each appellant, the stated reason for removal was "[f]ailure to satisfactorily complete upgrade training requirements" for the applicable next higher grade level (Appellees' Appendix, pp. 10, 13, 16, 19). In the case of each appellant, the notice stated that the particular position held was a "developmental position" requiring that the employee train "and acquire competence in the performance of duties at the next higher grade level." It was also pointed out that failure to meet the requirements for the next higher grade level could be grounds for separation.

The notices for appellants Haje, Bevilacque, Resler and Shannon recited that each had attended a training class at the New York Facility and then had attended upgrade training in Oklahoma City for approximately two months. It further stated that upon returning to New York, they were administered simulated control problems of the type specified in the National En Route Training

Program, Phase II (Agency Order 3120.9), and New York Center Order 3120.10, dated 7 December 1970, both of which require successful completion of a problem of 110 point complexity in order to pass the control problem phase of the training program. (Appellee's Appendix pp. 10, 13, 16, 19). The notices stated that none of the four had met this requirement at the end of their laboratory training. Several examples were cited of problems unsuccessfully attempted by each appellant, and it was indicated that the four appellants had all failed to provide adequate separation between converging aircraft. (Appellants' Appendix pp. 10-21).

Appellant McDowell's Notice of Proposed Removal stated that he had attended Limited Radar Training class from April 5 to April 30, 1971, at the New York Facility and that he had then received on-the-job training, during which he was to complete the check-out requirements of New York Center Orders 3120.1 and 3120.12 and of the New York Center Training Task Force Report. (Appellee's Appendix p. 22).[4] The notice recited that McDowell had failed to check out on his first test and had been granted an extension of training until March 19, 1972. However, he also failed to check out during this extension period. The Notice also gave examples of McDowell's unsatisfactory performance. (Appellee's Appendix pp. 22-23).

Upon service of the notices, all five appellants were informed that up to sixteen hours of official time could be used to review the material relied upon to support the proposed removals. They were also informed that they could reply to the proposals personally and/or in writing. (Appellants' Appendix pp. 12, 15, 18, 21, 23).

---

[4] In the case of appellant McDowell, the check-out requirements consisted of problems designed to test his ability to function in the position of Radar Controller Limited Development.

After considering appellants' replies, the FAA, in each case found that the "reason and specification" given in the Proposed Notice of Removal were fully supported by the evidence and warranted the individual's removal to promote the efficiency of the service. Mr. Haje was so notified on May 12, 1972, with his removal effective on May 19; Mr. Bevilacque, on April 28, 1972, effective May 5, 1972; Mr. Resler, on April 19, 1972, effective April 28, 1972; Mr. Shannon on April 19, 1972, effective May 5, 1972; and Mr. McDowell on September 20, 1972, effective September 22, 1972. (Appellants' Appendix pp. 24-30).

Plaintiffs Haje, Resler, and Shannon appealed directly to the FAA, and the FAA held hearings for them on August 29, 1972, September 20, 1972, and August 15, 1972, respectively. In each case the Hearing Officer sustained the removal and found that it was for such cause as will premote the efficiency of the service.

All five appellants then appealed to the New York Regional Office Civil Service Commission, which conducted a hearing for each of them. In each case, the reason and specification for removal cited in the notice of proposed removal was found to be supported by the evidence, and the action of the agency was found to be reasonable and for such cause as would "promote the efficiency of the service." All five appellants then appealed to the Board of Appeals and Review of the Civil Service Commission, which, in each case, affirmed the decision of the New York Reigonal Office. (Appellants' Appendix pp. 31-62). Appellants then instituted the action in the United States District Court for the Eastern District of New York, which resulted in the ruling which they now appeal.

ARGUMENT

The action of the Federal Aviation Administration in establishing a program to train qualified air traffic controllers was not contrary to statutory authority or arbitrary or unreasonable.

Title 5, U.S.C. §§ 7501(a) and 7512(a) establish the conditions under which an employee in the competitive civil service (including a preference eligible employee) may be removed—i.e., "for such cause as will promote the efficiency of the service." In appealing their dismissals, appellants contend that these statutes are to be interpreted so as to prohibit a federal agency from conducting a program in which it requires advancement and thus ensures itself a pool of individuals well trained in the skill involved—in this case air traffic controllers.[5] We respectfully submit that appellants' argument is without merit, for we believe that the FAA is in a unique position in that it is the only civilian employer of air traffic controllers, and thus, that the training program which it conducts is necessary not only to "promote the efficiency of the

---

[5] It is important to note what appellants do not claim. They do not allege that the process which resulted in their dismissals was not in accordance with the procedures to be followed in removing a Civil Service employee from his position. Those procedures are set out in 5 C.F.R. Part 752 subpart B. The record indicates that there was full compliance with all of these procedures, and both the Civil Service Commission and the district court so found (Appellants' Appendix, p. 130a; Appellees' Appendix, p. 31-62).

Appellants also do not contest the fact that the positions they occupied prior to their dismissals were described, in both FAA and Civil Service Commission job descriptions, as "developmental positions." They do not contest that continued training and progression to the next level of competence were requirements of these positions, nor do they contest that they failed to so progress. Finally, it should be noted that they do not claim to have been unaware of these published requirements.

service" but indeed to provide the trained personnel which are needed for the continued operation of this particular government service.

In *McTiernan* v. *Gronouski*, 337 F.2d 31 (2d Cir. 1964), this Court set out the scope of review in cases involving appeals of dismissal of government employees:

> "We approach the issues raised on this appeal mindful of the limited permissible scope of judicial review in this area. The taking of disciplinary action against government employees, including the invocation of the sanction of dismissal, is a matter of executive discretion, and is subject to judicial supervision only to the extent required to insure 'substantial compliance with the pertinent statutory procedures provided by Congress' . . . and to guard against arbitrary or capricious action. . ." *Id.* at 34.

Thus, in order to prevail below, appellants were required to show that, in their case, there was some violation of a right given to them by statute (or by regulations promulgated thereunder), or that the action taken against them, as employees, had no rational basis. This appellants did not do. The district court, after a review of the administrative record, granted summary judgment for the appellees, stating that "the factual determinations were based upon substantial evidence, that the FAA did not act arbitrarily or in abuse of its discretion, and that the dismissals were reasonably related to the promotion of the efficiency of the service." (Appellants' Appendix 130a). The record fully supports these findings.

At the outset, we note that normally it is not necessary for the efficiency of federal agencies that they provide for the training of their employees. However, in *Sullivan* v. *United States*, 416 F.2d 1277 (Ct. Cl. 1969), a case in which air traffic controllers challenged the legality of their dismissals from their jobs, the Court of Claims evaluated

in depth the very training program at issue in this case and concluded that air traffic controllers are not ordinary employees. The Court stated (416 F.2d at 1281):

> "The reopened proof sheds some light on the FAA training program, its history, operation and goals. It appears that in taking over the operations of the existing air traffic control centers in 1936, the FAA (or a predecessor) has been the only civilian employer of air traffic controllers in the United States; that, because of this, the agency has had to rely largely on its training program to meet its controller needs; and that, accordingly . . . the Agency program is designed to produce fully qualified journeymen air traffic controllers."

Appellants are quite correct in pointing out that a Grade 2 typist cannot be dismissed for failing to qualify for a Senior Typist position. (Plaintiffs-Appellants' Brief p. 16). However, it seems obvious that it is not necessary for a federal agency to train its own typists—a pool of trained typists already exists. A different situation, however, exists with respect to air traffic controllers. The job announcement for the position of Air Traffic Control Specialist recognizes this in noting that "[p]ersons appointed to any of the positions covered by this standard . . . constitute a reservoir from which promotions will be made to higher grades." (Appellants' Appendix p. 9).

Another difference exists, however, between a typist and an air traffic controller, and that is the severity of the consequences which can follow from the improper performance by an air traffic controller of his duties. As the FAA Hearing Examiner said with respect to plaintiff Shannon, "[o]f paramount importance in appellant's case . . . is the danger to life and property which would result if an unqualified controller permitted aircraft to proceed through airspace occupied by other aircraft. These were the appellant's failures. . . ." (Appellants' Appendix p. 63).

The determination of what is necessary to ensure the safety of the flying public is an area particularly within the administrative expertise of the FAA. Title 49 U.S.C. § 1348(b)(4) provides that the Administration is authorized "to provide necessary facilities and personnel for the regulation and protection of air traffic." In *United States* v. *Professional Air Traffic Controllers Organization (PATCO)*, 438 F.2d 79, 81 (2d Cir. 1970), this Court noted that "[t]he FAA is directed by statute to perform a specific task, requiring administrative expertise, in a manner consistent with the public interest. 49 U.S.C. § 1348 (1964). It is for the FAA, not the courts, to gauge the need for and the effect of disciplinary action. . . ." Similarly, in *Air Line Pilots Association, International* v. *Quesada*, 276 F.2d 892, 898 (2d Cir. 1960), this Court noted that "[i]t is not the business of courts to substitute their untutored judgment for the expert knowledge of those who are given authority to implement the general directive of Congress."

As already indicated (footnote 5, *supra*), appellants do not contest the fact that the FAA made both initial employment and continued employment conditional upon ability to pass promotional examinations. Rather, they contend that "[i]n the absence of any proof or evidence that appellants were not properly performing their duties in the positions which they permanently occupied, they should have remained in their permanent grades." (Appellants' Brief p. 16). However, appellants forget that the positions which they were occupying were *training* positions and that their most important duty, which they did not perform, was to learn the more complicated skills which would allow them to progress.

Appellants attempt to distinguish *Sullivan* v. *United States*, *supra*, on the grounds that the plaintiffs therein, who were GS8's, had never been promoted to a higher position, whereas appellants here were promoted. First,

it should be noted that the *Sullivan* case makes clear that the plaintiffs therein *had been promoted* from GS-6's to GS-8's. Second, and more important, is the fact that appellants have failed to cite any authority for the proposition, which they advance, that a tenured federal employee's rights depend on whether or not he has been promoted. It is clear that the plaintiffs in the *Sullivan* case were tenured; indeed, they attempted to argue that the expiration of their probationary periods had insulated them from further examination of their qualifications. *Sullivan* v. *United States*, *supra*, 416 F.2d at 1283.

The point of the *Sullivan* decision was that plaintiffs therein were found to be *trainees* and hence subject to dismissal for failure to progress. "Whether it is proper to measure a Government employee's performance by the degree to which he has learned the skills of the next higher position depends on whether he has been hired as a trainee whose primary duties are to learn such skills. . . ." *Sullivan* v. *United States*, *supra*, 416 F.2d at 1283. It was made clear to each of the appellants in the case at bar when he was hired that failure to pass training requirements might result in dismissal. (Appellants' Appendix p. 9).

In determining that the plaintiffs in *Sullivan* were in fact trainees, the court relied on descriptions of their duties contained in existing position descriptions. *Sullivan* v. *United States*, *supra*, 416 F.2d at 1282. On this basis it is clear that appellants here were trainees at the time of their dismissals.

Under Title 5 U.S.C. § 5105, the Civil Service Commission is responsible for preparing standards describing positions. Pursuant to this statute, the Commission prepared a Position Classification Standard for the position of Air Traffic Control Specialist (Center), GS-2152,[6] which pro-

---

[6] All plaintiffs come within this classification. (Appellants' Appendix pp. 35, 59).

vides that "at the training and developmental levels, the controller is required to gain a great deal of knowledge. . . . At those levels he is also required to demonstrate that he is satisfactorily developing the skills and abilities to control air traffic." (Appellants' Appendix pp. 35, 59). At both the GS-9 and GS-11 levels, the Standard provides that the position is an advanced developmental level and that an incumbent is evaluated both on his performance in his present grade and "on his potential for progression to higher levels." *Id.*

Pursuant to this Position Classification Standard, the FAA included in the position description for an Air Traffic Control Specialist (Center), GS-2152, at grade 11 level (Appellants' Appendix pp. 64-66), grade 9 level (Appellants' Appendix pp. 67-68), and grade 7 level (Appellants' Appendix pp. 6-7) the statement that "[i]ncumbents of this position who fail to meet the requirements for or to accept promotion to the next higher non-supervisory grade level may be reassigned, demoted or separated from employment." Similarly, the position announcement for the GS-6 level notes that "[f]ailure of personnel to pass training requirements for, or to accept promotion to higher grade Air Traffic Control Specialist positions, may constitute grounds for reassignment, demotion, or separation from employment." (Appellants' Appendix p. 9).

In this case, it is clear that plaintiffs were hired not as ordinary employees but as trainees, and the conditions under which they were hired were clearly stated. These conditions were imposed because of the necessity to have a highly qualified pool of air traffic controllers available. Appellants' separate dismissals for failure to progress were entirely proper, on the basis of the special needs

of the FAA and the rationale of *Sullivan* v. *United States*, *supra*.[7]

CONCLUSION

The order of the district court granting summary judgment for the appellees should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
CONSTANCE M. VECELLIO,
Assistant United States Attorneys,
Of Counsel.

---

[7] It is clear that the "caveat" in *Sullivan*, referred to at p. 13 of Appellants' Brief, was meant to point out the uniqueness of the factors which required the establishing of a training program for air traffic controllers and to emphasize that the decision has no *general* applicability to the federal Civil Service.

Appellants' reliance on *Caputo* v. *Resor*, 360 F.2d 770 (2d Cir. 1966) is similarly misplaced. Plaintiffs in that action were maintenance personnel who were protesting a reduction in salary. There was no allegation that the plaintiffs in *Caputo* were part of a training program of any type, nor was there any other similarity to the facts in the case at bar.

★ U. S. Government Printing Office 1976— 714—018—1

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CONSTANCE M. VECELLIO, being duly sworn, says that on the 29th day of October, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Resnicoff & Gordon, P.C.

666 Third Avenue

New York, New York 10017

Constance M. Vecellio

Sworn to before me this
29th day of October, 1976

Carolyn N Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4610172
Qualified in Kings County
Term Expires March 30, 1977